FILED
FEB 2 1971
E. ROBERT SEAVER, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1970 No. 49 Original

STATE OF ILLINOIS, ex rel.
WILLIAM J. SCOTT, Attorney General of Illinois,

Plaintiff,

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and
CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and
CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and
CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and
THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and
THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,

Defendants.

## BRIEF OF CITY OF RACINE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THE BILL OF COMPLAINT

JACK HARVEY, City Attorney
EDWARD A. KRENZKE, Dep. City Attorney
LOUIS J. ROSHAR, Asst. City Attorney

Attorneys for Defendant
CITY OF RACINE
730 Washington Avenue
Racine, Wisconsin 53403

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## BRIEF OF CITY OF RACINE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THE BILL OF COMPLAINT

THE COURT IS WITHOUT ORIGINAL JURISDICTION IN A SUIT BY A STATE IF ANY OF ITS OWN CITIZENS ARE NECESSARY AND PROPER PARTY DEFENDANTS

The City of Racine objects to Plaintiff's petition for leave to file a Bill of Complaint with the Court on the grounds that citizens and private and municipal corporations of Plaintiff, State of Illinois, are necessary and proper party defendants. Under these circumstances the Court is without original jurisdiction to receive plaintiffs Bill of Complaint. (Georgia vs. Pennsylvania Ry Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S.Ct. 716 reh. den. 324 U.S. 890, 89 L. Ed. 1437, 65 S.Ct. 1018, Massachusetts vs. Missouri, 308 U.S. 1, 84 L. Ed. 3, 60 S.Ct. 39, Minnesota vs. Northern Securities Co., 184 U.S. 199, 46 L. Ed. 499, 22 S.Ct. 308.)

One of the principal municipalities that is a necessary and proper party defendant is the Northshore Sanitary District of Illinois, whose geographic limits encompass the area which is bounded on the north by the Wisconsin-Illinois State line, on the south by the Cook County line, and which is approximately 3 to 6 miles in width and parallel to the west shore of Lake Michigan (See Ptfs. Exh. A. Map).

IN THE INTEREST OF CONVENIENCE, EFFICIENCY AND JUSTICE THE COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO TAKE ORIGINAL JURISDICTION IN THIS MATTER.

Assuming the Court finds that it is within its constitutional power to take original jurisdiction

in this matter, acceptance is discretionary with the Court where it is in the interest of convenience, efficiency, and justice to do so, and another adequate tribunal is available. (Georgia vs. Pa. Ry Co., supra).

It is within the authority of Congress to confer upon inferior tribunals concurrent jurisdiction with this Court of civil actions to which a state may be a party. (Ames vs. Kansas, 4 S. Ct. 437, 111 U.S. 469, 28 L. Ed. 482).

When Congress adopted the Federal Water Pollution Control Act (Title 33 U.S.C. 466 et seq.) it did two things: It provided administrative procedures to deal with problems such as those that are characterized in plaintiff's Bill of Complaint; and secondly it conferred concurrent jurisdiction on inferior tribunals of controversies involving construction or application of interstate compacts, and pollution of waters (Title 33 U.S.C. 466 g-1).

On November 22, 1967, plaintiff invoked the administrative procedures of the Federal Water Pollution Control Act, and in January, 1968, there was called the "Conference in the Matter of Pollution of Lake Michigan and its Tributary Basin (Wisconsin - Illinois - Indiana - Michigan)." At the same time a joint statement of agreement was entered into between the four states and jurisdiction over the subject matter of pollution of Lake Michigan was assumed as well as jurisdiction over all persons and municipalities concerned with the problem. Water quality standards were established and are now being implemented through state legislation and the issuance of abatement orders to municipalities, and which orders must be met within fixed time schedules.

(Cfr. Proceedings. Conference, Pollution of Lake Michigan and its Tributary Basin, Illinois, Indiana, Michigan, and Wisconsin. U.S. Dept. of the Interior, Federal Water Pollution Control Administration).

No violation of the existing interstate compact, or of any existing abatement orders, or breach of any established time schedule is alleged in the proposed Bill of Complaint; nor has any complaint of a similar nature been filed under the procedures authorized under Title 33 U.S.C. 466 et seq. (Cfr. Conference Proceedings, supra).

If this Court were to assume original jurisdiction, other parties would have to be added, schedules already commenced under the Conference will be delayed and/or deferred, procrastinating municipalities will be afforded further opportunity to delay necessary remedial measures to clean up Lake Michigan, and the Conference (with its 3-year old program) will be divested of its jurisdiction and the achievement of its goals delayed.

On this basis it is submitted that the Court should deny plaintiff leave to file its proposed Bill of Complaint.

Respectfully submitted,

JACK HARVEY, City Attorney
EDWARD A. KRENZKE,
Dep. City Attorney
LOUIS J. ROSHAR,
Asst. City Attorney
Attorneys for Defendant
City of Racine
730 Washington Avenue
Racine, Wisconsin 53403

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*Defendants.*

## BRIEF OF THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE

JOHN J. FLEMING
City Attorney of the City of Milwaukee

HARVEY G. ODENBRETT
Principal Assistant City Attorney

Attorneys for Defendant,
Sewerage Commission of
the City of Milwaukee

Room 800—City Hall
200 East Wells Street
Milwaukee, Wisconsin 53202

Wisconsin Law Printing, Inc., Milwaukee, Wisconsin

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BRIEF OF THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE

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## INTRODUCTION

This brief is filed on behalf of the defendant, Sewerage Commission of the City of Milwaukee, in response to the motion of plaintiff, State of Illinois, for leave to file its complaint. This defendant opposes the motion for leave to file the complaint on the following grounds:

1. This court should refrain from accepting jurisdiction over the proposed action because an adequate remedy exists before an administrative agency of the federal government and procedures to protect the water quality of Lake Michigan are in progress before that agency.

2. Under the laws of the State of Wisconsin, the Sewerage Commission of the City of Milwaukee is not a municipal corporate entity in its own right, and, hence,

is not a citizen of the State of Wisconsin for jurisdictional purposes.

Facts in addition to or in contradiction of those stated in the brief of the plaintiff shall be stated in the argument at the relevant points.

I.

## ARGUMENT

### THIS COURT SHOULD REFRAIN FROM ACCEPTING ORIGINAL JURISDICTION OVER THE PROPOSED ACTION BECAUSE AN ADEQUATE REMEDY EXISTS BEFORE AN ADMINISTRATIVE AGENCY OF THE FEDERAL GOVERNMENT AND PROCEDURES TO PROTECT THE WATER QUALITY OF LAKE MICHIGAN ARE NOW IN PROGRESS BEFORE THAT AGENCY.

The Federal Water Quality Administration, formerly an agency of the Department of the Interior and now a division of the Environmental Protection Agency, has been empowered by Congress to investigate and correct pollution of interstate waters. This jurisdiction extends to both municipal and industrial sources of water pollution. The agency is empowered to issue administrative orders after notice and hearing requiring correction of causes of interstate pollution. These orders may be enforced by the Department of Justice of the United States in the Federal Courts. 33 U.S.C. 466, et seq., as amended.

In 1967, the Secretary of the Interior initiated the first step in the federal enforcement process by convening an enforcement conference pursuant to the legislation cited above to investigate and determine standards of water quality to be achieved and maintained for the waters of Lake Michigan and to determine what action was and is necessary to obtain the desired result. Numerous hearings and meetings have been held by this enforcement conference. Water quality stan-

dards have been determined, agreed upon and adopted by the participating states. All four states riparian to Lake Michigan (Wisconsin, Illinois, Indiana and Michigan) are participating in this conference. Corrective operating standards for municipal sewage treatment and disposal have been determined by the conference and adopted and implemented by the participating states through the issuance of administrative orders by their water pollution control agencies, including compliance schedules.

The federal administrative procedures now in progress were invoked by the State of Illinois at the request of its then Governor, the Hon. Otto Kerner, in a letter dated November 22, 1967, addressed to the Secretary of the Interior. This request was based upon the allegation that pollution of Lake Michigan adversely affecting the health and safety of the citizens of the State of Illinois was originating from sources outside the borders of that state. The Secretary of the Interior made the prerequisite jurisdictional finding of fact that there was reasonable evidence to support this claim and proceeded to convene the Lake Michigan Enforcement Conference.

The State of Illinois bases its claim for relief in the proposed action on the grounds that the alleged pollution by the named defendants adversely affects the health and safety of the citizens of the State of Illinois. These are the same grounds used by the Secretary of the Interior for initiation of enforcement by the Federal Water Quality Administration under 33 U.S.C. 466, as amended. Such action has been initiated by this agency and has been carried to the

point of requiring state pollution control agencies to issue corrective orders. This has been done.

Where Congress has provided statutory procedures designed to permit administrative agency expertise to be brought to bear on particular problems, those procedures ought to be exclusive. Whitney National Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 13 L.Ed. 2d 386, 85 S. Ct. 551.

Should the State of Illinois be of the opinion that it has been aggrieved by the actions of the administrative agency, an adequate procedure for judicial review of the agency's actions is available under the Federal Administrative Procedure Act, 5 U.S.C.A. 1000 et seq., when review becomes timely.

Inasmuch as the State of Illinois initially selected the administrative agency as the forum for the resolution of this problem, it should be held to have made at least a temporary election of remedies and be barred from requesting duplicitous and simultaneous remedies for the same cause of action.

The cases cited by the State of Illinois, in support of its motion for leave to file the complaint in this state, all substantially predate the federal legislation described previously. Only one of these cases dealt with interstate water pollution. New Jersey v. New York City, 283 U.S. 473, 51 S. Ct. 519, 75 L. Ed. 1176 (1931). One case dealt with interstate air pollution for which there is no current federal legislative remedy. Georgia v. Tennessee Copper Co.,

206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907). The other case cited is the first Chicago diversion case, which also involves a situation for which there is no current federal legislative remedy. Wisconsin v. Illinois, 281 U.S. 179, 50 S. Ct. 266, 74 L. Ed. 799 (1930). We respectfully submit that these cases are no longer reliable authority for the exercise of original jurisdiction by this court in matters of interstate water pollution.

## II.

## UNDER THE LAWS OF THE STATE OF WISCONSIN, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE IS NOT A MUNICIPAL CORPORATE ENTITY IN ITS OWN RIGHT, AND, HENCE, IS NOT A CITIZEN OF THE STATE OF WISCONSIN FOR JURISDICTIONAL PURPOSES.

The pleadings state that the Sewerage Commission of the City of Milwaukee is a municipality incorporated under the laws of the State of Wisconsin and is a political subdivision thereof. The Sewerage Commission of the City of Milwaukee does not have the status of a municipal corporation under the laws of the State of Wisconsin. The laws of the State of Wisconsin create a special purpose district, which is called the Metropolitan Sewerage District of the County of Milwaukee and is described as a "municipal body corporate." Section 59.96(5), Wisconsin Statutes, (1967). The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee serve as the governing bodies of the District and each

Commission is delegated certain powers to act individually for the District and certain other powers are exercised jointly. Section 59.96(5), Wisconsin Statutes, (1967). S.D. Realty Co. v. Sewerage Commission (1961), 15 Wis. 2d 15, 112 N.W. 2d 177. Thielen v. Metropolitan Sewerage Commission (1922), 178 Wis. 34, 189 N.W. 484.

The Sewerage Commission of the City of Milwaukee was originally created and its powers established by Chapter 608 of the Wisconsin Laws of 1913. However, its duties and responsibilities were substantially changed by the adoption of Chapter 554 of the Wisconsin Laws of 1921, now codified as Section 59.96, Wisconsin Statutes. Basically its functions are to construct, operate and maintain sanitary main sewers within the corporate limits of the City of Milwaukee and to plan, construct, operate and maintain sewage treatment plants on behalf of the District.

The Sewerage Commission of the City of Milwaukee does not have the legal capacity to sue and be sued, except in conjunction with property acquisition on behalf of the District.

The Sewerage Commission of the City of Milwaukee does not have the power to tax in its own right. The Commissions must act jointly to certify taxes on behalf of the District.

The Sewerage Commission of the City of Milwaukee does have the power of eminent domain, but must exercise it in the name of and on behalf of the District. Title to property taken is held in the name of the District. In Thielen v.

Metropolitan Sewerage Commission, supra, the District was held to have the legal status of at least a quasi-municipal corporation generally analogous to a school district or drainage district in Wisconsin.

For purposes of determining federal jurisdiction, a local unit of government must have at least the status of a municipal body corporate in order to qualify as a citizen of the state in which it is located. 32 Am. Jur. 2d 532, Federal Practice and Procedure, Section 108. The Sewerage Commission of the City of Milwaukee does not have this status under the Laws of Wisconsin and, thus, is not a citizen of the State of Wisconsin for purposes of invoking the original jurisdiction of this Court under Article III, Section 2, Clause 2, of the Constitution of the United States and Title 28 U.S.C., Section 1251.

## CONCLUSION

We respectfully submit that the motion for leave to file complaint by the State of Illinois alleging that the Sewerage Commission of the City of Milwaukee is polluting the interstate waters of Lake Michigan, in such a manner to adversely affect the health, safety and welfare of the citizens of the State of Illinois, should be denied on the grounds that an appropriate remedy is available before the Federal Water Quality Administration and that this remedy has, in fact, been initiated by the State of Illinois and implemented by the State of Wisconsin through the Department of Natural Resources and that proceedings are pending before the Federal Water Quality Administration. Any further action in another forum should be barred under the doctrine of primary jurisdiction until such time as the administrative remedy that has been selected by the State of Illinois has been exhausted. There appears to be a serious question as to the status of this responding defendant, inasmuch as it is not in and of itself a "municipal body corporate" and, hence, is not a citizen for the purpose of conferring federal jurisdiction.

Respectfully submitted,
JOHN J. FLEMING, City Attorney
HARVEY G. ODENBRETT,
Principal Assistant City Attorney
Attorneys for Defendant
SEWERAGE COMMISSION OF
THE CITY OF MILWAUKEE

Room 800 - City Hall
200 East Wells Street
Milwaukee, Wisconsin 53202